IN THE

SUPREME COURT OF THE UNITED STATES

JUNE, 1979

NO. 78-6899

ROBERT FRANKLIN GODFREY,

Petitioner,

-V.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia which was argued on November 20, 1978, decided February 27, 1979 and the rehearing was denied March 27, 1979.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in Godfrey V. The State, 243 Georgia 302 (1979) and is set out in Appendix A hereto, pp 1a-17a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was final on March 27, 1979 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), petitioner having asserted below and asserting her deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the privileges and immunities clause therein.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. Section 26-1101

> "Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> (c) A person convicted of murder shall be punished by death or by imprisonment for life."

Ga. Code Ann. Section 26-3102

> "Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. Section 27-1502

"Plea of Insanity, How Tried. Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue of that plea to be first tried by a special jury, and if found to be true, the court shall order the defendant to be delivered to the superintendent of the Milledgeville State Hospital, there to remain until discharged in the manner prescribed by law."

Ga. Code Ann. Section 27-1503

"Acquittal because of Insanity; Contents of Verdict; Confinement of Prisoner. In all criminal trials in any of the courts of this State wherein an accused shall contend that he was insane or mentally incompetent under the law at the time of the act or acts charged against him were committed, the trial judge shall instruct the jury that, in case of acquittal on such contention, the jury shall specify in their verdict that the accused person was acquitted because of mental irresponsibility or insanity at the time of the commission of the act. If such a verdict of acquittal shall be returned by a jury in any case, it shall thereupon became the duty of the trial judge to retain jurisdiction of the person and to order the person to be confined in a State hospital for the mentally ill, to be selected by the Department of Public Health, for a period not to exceed one year, and to provide in said order that such person shall not be released from said hospital upon compliance with the terms and provisions of Chapter 88-5, relating to hospitalization of the mentally ill, as amended. Should continued hospitalization be necessary following the initial period of hospitalization ordered by the trial judge, the superintendent shall apply for an order of continued hospitalization under the provisions of Section 88-506.6, relating to the procedure for continued hospitalization."

Ga. Code Ann. Section 27-2534.1

"Mitigating and aggravating circumstances; death penalty. (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the (statutory) aggravating circumstances enumerated in Code Section 27-2534.1 (b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. Section 27-2537

"Review of death sentences. (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code Section 27-2534.1 (b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ on appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws, 1973, p. 162, Act No. 74

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code Section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Georgia Laws, 1973, p. 171, Act No. 74

"Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the

provided in Code Section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

Ga. Code Ann. Section 26-603

Acts Presumed To be Wilful. "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted."

Ga. Code Ann. Section 26-604

Consequences presumed intended. "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted."

Ga. Code Ann. Section 26-605

Intention a question of fact. "A person will not be presumed to act with criminal intention, but the trial facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted."

Ga. Code Ann. Section 26-606

Presumption of sanity. "Every person is presumed to be of sound mind and discretion but the presumption may be rebutted."

Ga. Code Ann. Section 26-702

Mental capacity; insanity. "A person shall not be found guilty of a crime, if at the time of the act, omission, or negligence constituting the crime, such person did not have mental capacity to distinguish between right and wrong in relation to such act, omission or negligence."

The legislative committee notes titled "Criminal Act and Mental State" found in the Criminal Code of Georgia after Chapter 26-6 at pages 88 and 89 of Book 10 are set out as Appendix B to this petition since they are important in the Court's consideration of the Question Number Six raised herein regarding the Court's failure to charge Defendant's Request to Charge Number Eight incorporating the above referred to Statutes from Chapter 26-6 regarding criminal intent under the circumstances of this case.

QUESTIONS PRESENTED

1. (a) Whether the death sentence in this case based upon the jury's partial finding of the seventh aggravated circumstance (GCA Section 26-2534.1 (b) (7), was so incomplete under the statutory language as to be void and deprived the petitioner of the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

(b) Whether by upholding the death sentence on this partial finding of an aggravated circumstance and upon the facts of this domestic killing involving powerful emotional provocation, the Supreme Court of Georgia has adopted the open-ended construction of this seventh aggravated circumstance disapproved by this Court in Gregg V. Georgia?

(c) Whether the death sentence review conducted by the Supreme Court of Georgia in this case was so superficial as to have violated the petitioner's right to due process of law and the equal protection of the law as guaranteed under the Constitution of the United States?

2. Whether the dismissal of petitioner's challenge to the constitutional composition of the Grand Jury which indicted him on the grounds that it was not timely filed because filed after the indictment was rendered, even though such filing was over a month before the arraignment and trial date deprived the petitioner of the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

3. Did the trial court's failure to give a requested charge on manslaughter, under the facts of this case where there was substantial evidence of extreme emotional provocation, deny the petitioner the due process of law and the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States?

4. Is the showing of gruesome, bloody color photographs to the jury, where the evidentiary basis for their admission is tenuous, if not non-existent, and certainly cumulative, so inherently prejudicial as to have violated the petitioner's rights to due process and a fair trial as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?

5. Did the failure of the trial court to specify or elaborate regarding particular mitigating circumstances involved in this case in the court's charge to the jury on the sentencing phrase of the trial violated the petitioner's rights to due process of law, a fair trial, and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States?

6. Did the trial court's failure to give Defendant's Request to Charge Number Eight, which tied together various aspects related to proof of criminal intent, and which concisely, and legally, stated the Georgia law upon which the defense was based, violate the petitioner's rights to due process of law, and a fair trial under the Fourteenth Amendment to the Constitution of the United States?

7. Is the antiquated Georgia practice of reading from Georgia Supreme Court cases, in the direction of the judge, and in the presence of the jury, so inherently fraught with prejudice that it denies the due process of law and the right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States? Or, if not, was the Georgia rule misapplied in this case by allowing the district attorney to read the facts of a similar case that had been upheld by the Supreme Court of Georgia, in front of the jury, and thereby violating the petitioner's right to due process, fair trial, and equal protection of the laws under the Constitution of the United States?

8. Is the Georgia death penalty statutory scheme unconstitutional because it does not include a option whereby the jury may recommend a sentence of life without the possibility of parole ?

STATEMENT OF THE CASE

Robert Franklin Godfrey, the defendant named above as petitioner, was indicted for the murders of his wife and mother-in-law and the aggravated assault upon his young daughter by the Polk County Grand Jury on December 15, 1977, wherein it was alleged these offenses were committed by him on September 20, 1977.

The petitioner had a previous history of confinement at the Central State Mental Hospital in Milledgeville, Georgia. He had been at Central State in 1950, 1966, and 1970, and once at the Veterans' Administration facility in Murfreesboro, Tennessee. (TR-364) These confinements were due to a drinking problem, connected with depression and violent episodes toward his wife. (TR-439) The petitioner endured these confinements voluntarily so that his wife would take him back, and he and his wife were always reconciled after the petitioner was confined for short periods of time, the most being two months. (TR-364) The Defendant had also undergone brief treatment by a psychiatrist, Dr. William S. Davis, in the mid-sixties in Rome, Georgia, when Dr. Davis practiced there before moving to Atlanta.

The defendant had been employed for approximately 25 years, with two short breaks, at the Northwest Regional Hospital in Rome, Georgia. In the earlier years, the defendant was a surgical nurse and in recent years his duties involved post-operative care and routine duties upon the wards. He was described by the head nurse and supervisor, Mrs. Jean Lebkicker, (TR-293 - 294) and the chief surgeon, Dr. Joseph Liang, (TR-299, 300), who testified to his good reliable honest character based upon working with him for over 20 years, as believable, very good and reliable at his work, and particularly gentle with patients and especially children. The defendant had been a combat medic in World War Two and Korea. (TR-424) The defendant suffers from extreme hypertension and is a diabetic who can not tolerate insulin (TR-368). In 1976, the petitioner ran as Chief Deputy Sheriff with the losing candidate in the Sheriff's race in Polk County.

On September 5, 1977, the defendant got into an allegedly violent argument with his wife and pulled a knife on her. (TR-366) His wife then left him and stayed with relatives for a short time thereafter moving in with her mother. Her mother lived in a trailer approximately 200 yards downhill from the defendant's house. The trailer was situated next to a nephew's trailer and in the backyard of a house on the main road where

the defendant's married daughter lived. The defendant's house was at the end of a long driveway going in near the house and trailers and winding up through some trees onto a hill. During the separation, the defendant talked with his wife on three occasions briefly but she would not agree to move back home. (TR-367)

Then Mrs. Godfrey had divorce papers served upon the petitioner in which she asked the Court to award all the property and their minor daughter to her. Mr. Godfrey did not consult with a lawyer. The hearing upon the divorce was set for September 22, 1977. Throughout the separation, Mr. Godfrey was very anxious to reconcile with his wife as had always occurred in the past. (TR-374,375)

On September 20, 1977, the petitioner went to work as usual and performed his normal duties throughout the day at the hospital in a normal manner. He was called sometime during the day by his mother-in-law and told that his wife wanted to talk with him by telephone that evening. This led the defendant to hope that their differences would be resolved. The petitioner got home around 4:00 o'clock, P. M., and fixed himself something to eat. Mrs. Godfrey called him around 5:00 to 5:30 o'clock, P. M., they argued, and she would not agree to reconcile with the petitioner and stated that she wanted all the property as well. Mrs. Godfrey hung up after saying she would call back later. The petitioner testified that he was extremely depressed by this. (TR-373,375)

Mrs. Godfrey called back later, approximately 7:30 o'clock, P. M., according to petitioner's testimony, but he was not sure about the time. (TR-376,378) This second conversation, according to the petitioner, was more heated and Mrs. Godfrey ended the call with a final rejection of petitioner's attempt to save the marriage and by again telling the defendant that she wanted all the property and would see him in court. Upon hanging up the telephone the defendant testified that he had never in his life experienced such a low feeling, as if kicked in the stomach, and then he blacked out and has no further memory of the subsequent events until the following day when he woke up in the Polk County jail. (TR-379)

The evidence, through various witnesses, established that the petitioner, at some time shortly after the second telephone call, got his single shot 20 guage shotgun and walked down the hill to his mother-in-law's trailer where Mrs. Godfrey, Mrs. Wilkerson, the mother-in-law, and petitioner's 12 year old daughter were seated around a table playing cards. The petitioner then shot his wife through the window in the forehead killing her instantly and proceeded into the trailer and hit his daughter on the head with the gun as she ran out towards the married daughter's house. The petitioner then shot his mother-in-law in the head with one shotgun blast killing her instantly. Petitioner then called the Polk County Sheriff's office and told the dispatcher, after identifying himself, to tell the Sheriff that he had just blown his wife's and mother-in-law's heads off and to come and get him. (TR-198)

The petitioner then went outside into the yard and placed the shotgun in the branches of an apple tree. Then he went toward his married daughter's house near the road and sat down in a chair under a shade tree to wait for the police. When the police arrived he told them "they're dead, it's all over with", and showed one officer where the gun was placed in the tree. He was described by all of the officers as very calm looking, steady on his feet, with no odor of intoxicants on his breath, and it was all of the officers opinion that he was definitely not intoxicated. (TR-276) Concerning his mental state at the time of the shootings, it is significant to note that all of his previous history of violence was associated with very heavy intoxication, whereas, on this occasion, he had not had anything to drink. (TR-364) Later, at the Polk County Police station, according to one officer with whom he was left alone, and who made no tape recording or written statement, the petitioner allegedly told this particular officer that he had done a terrible thing, had thought about it for a long time, and would do it again. (TR-239)

At the trial, the defense marshalled testimony relative to the petitioner's mental state at the time of the shootings. Dr. William S. Davis, a highly qualified psychiatrist who is on the clinical teaching staff at Emory Medical School and is Past President of the Georgia Psychiatrists Association, testified that in his opinion the second telephone conversation with his wife, created such an emotional trauma and provocation that it caused the petitioner to go into an altered state of consciousness described by Dr. Davis as a dissociative reaction, as evidenced by the blackout of memory and the petitioner's previous history of blackouts. Dr. Davis further testified that in this state the petitioner's conscious will could not control his subconscious impulses and resulting acts. Dr. Davis had seen and treated the defendant in the mid-sixties in Rome when Dr. Davis was with Harbin Clinic and had also seen him on two occasions, pursuant to court

order, in the month prior to the trial of the case. The second visit to Dr. Davis' office at Peachtree Parkwood Mental Hospital, where he is Chief of Staff, was specifically for a sodium amytal (properly known as truth serum) interview to determine, among other things, the petitioner's truthfulness concerning the loss of memory and the emotional trauma he felt at the recognition that he would not, finally, be able to once again save his marriage. Significant portions from the transcript of Dr. Davis' testimony are set out as follows:

" Q. Doctor, based on his relation of this history to you and your previous knowledge of him, were you able to upon your examination to form any kind of opinion to what the state of his mind was at that time - on the 20th after the last telephone call?

A. Yes, I decided that on the 20th after the telephone call that he had a .....what is known as a dissociative state, a dissociative attack, and that this attack lasted from the time he first realized that she was not coming back home until he woke up the next day in jail and came back to his senses at that point in time. (TR-313).....

A. Yes sir, a dissociative state, I guess a dissociative state is the most common psychiatric condition which is known to be one of the most common non-psychotic psychiatric conditions which is responsible for some alteration in consciousness. In a dissociative state a person can just actually cut off from his mind oh, stimuli such as say bodily sensations may not come through to awareness. He may cut off from his mind awareness of what is going on around him, he may cut off from his mind memory, all of these things can cut from mind when in a state of dissociation. And in such a state a person may be able to carry out thoughts, feelings, impulses, which he could not release were he in his normal state of conscious awareness. I guess you might say in that condition a person might be acting sort of automatically, that his will, if you will, his will was absent or greatly reduced may be example.....(TR-314,315).....

Q. (Hypothetical questions stated) .....The question is, assuming those facts are true, is that consistent with the type mental state that you have described to us, or unusual?

A. Yes, it is. A person in a state of dissociation can carry on a conversation and unless someone is familiar with dissociative states and happens to think about it, they could appear to be, you know, reasonably normal or almost completely normal. One thing about that whole scene that really struck me as further, at least in my mind, evidence that he was in a dissociative state was his very normalcy, if you will. The fact that he showed no emotional upset, that he was not torn up after having done such a thing as he did, the fact that he was very calm, very quiet about the whole thing, that in of its self to me is abnormal. The fact that he appeared so normal in such conditions is to me abnormal and says to me that there was something, you know, going on haywire inside his head. Whereas, the feeling was split off from the action that he had actually done, it had been dissociated. (TR-317, 318) .....

Q. I am speaking of after the telephone call (the second phone call) with his wife. In your opinion was the defendant's mind or reasoning power to any extent impaired thereafter?

A. Okay, yes, I think that it was and it must have been because at that point in time he was .....remembers being ..... he remembers being overwhelmed with a feeling of despair. He remembers.....well, he said he was like being kicked in the stomach, he said that he never ....he had wrestled and he had fought but he had never been hurt physically anything like as badly as he was hurt when he finally realized that it was over. There was no chance for reconciliation, and then he says to me that everything just sort of faded away, went black, and I think at that point his conscious....the over.....the emotion I started to say overwhelming emotion, and I think it was an overwhelming emotion, I think the emotion of the final finality of her rejection really did overwhelm him and he went into this state of dissociation.

Q. Do you have an opinion as to whether or not his acts immediately thereafter that evening would be the product of his will?

A. I think that these are acts that he could not have done had he been at himself consciously. I think had he been in his usual state of conscious awareness this act was at the time so abhorrent to him that he could not have done it.

Q. While someone is in this state of dissociation, can they exercise control over their ....does their will, conscious will, have the ability to exercise control over their automatic actions?

A. Not the same.....no. Not to the same degree. Not to any thing like the same degree as would occur when he was normally aware and alert.

Q. When a person is in this type of state do you have an opinion whether or not they are able to distinguish between right and wrong and to be able to consciously control their actions relative to that?

A. I think they might know the difference between right and wrong but their ability to control powerful emotional forces acting on them is markedly reduced and I think in such a state a person might very well not be able to exercise control to such a degree that he could prevent himself from doing something which he knew was wrong." (TR-320 -324)

Dr. Davis testified that the petitioner could not remember the crimes even after receiving an injection of sodium amytal, although the drug did not affect him as much as most people, perhaps because of his history of heavy drinking.

The State's experts from Milledgeville, the State Mental Hospital, agreed with the description of the dissociative state as described by Dr. Davis, but, of course, felt that the defendant did not experience one. The State's psychiatrist and psychologist, as well as Dr. Davis, agree however that this dissociative state is not a psychotic condition. The State's experts were a young psychologist with ten months experience and the other, a psychiatrist who had been at Milledgeville for a good many years and who not remember very much about the interview with the petitioner while he was at Milledgeville under court order for examination a month before the trial of the case.

On March 9, 1978, the jury brought back guilty verdicts on all counts of the indictment and upon the sentencing stage, fixed the punishment at death and designated as the aggravating circumstance or circumstances: "That the offense of murder was outrageously or wantonly vile, horrible, and inhuman." Even though the statutory aggravating circumstance reads as follows: "That the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim." (Emphasis supplied by counsel) The District Attorney, in addressing the jury on the sentencing phase, had announced that torture was not involved, and aggravated battery was not involved. (TR-570,571)

On Monday, March 13, 1978, the Court sentenced the defendant to death by electrocution and set the date at April 14, 1978 at 11:00 o'clock, A. M, and gave the petitioner ten years to serve on the aggravated assault conviction. A Motion for New Trial was timely made and after a few months waiting for the record to be prepared, the Motion was overruled and a Notice of Appeal was timely filed to the Georgia Supreme Court. Petitioner's Brief was filed in said Court October 22, 1978 and the case was argued November 20, 1978. The convictions and sentences were upheld by the Court, with two dissenting Justices, on February 27, 1979 and the Rehearing was denied on March 27, 1979.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The entire Georgia Death Penalty Statutory Scheme was attacked in a pre-trial Motion to Dismiss which was overruled by the Trial Court and pursued as Enumeration of Error Number 19 in the appeal to the Georgia Supreme Court. In the brief before the Georgia Supreme Court, petitioner argued that the partial finding of the statutory aggravating circumstance rendered the death sentence void on constitutional grounds but the Georgia Supreme Court rejected all of these arguments and approved the phraseology used by the jury.

2. The petitioner's pre-trial Motion challenging the Array of Grand Jurors was dismissed as not timely filed and was attacked in the appeal to the Georgia Supreme Court in Enumeration of Error Number 7 as depriving petitioner of due process of law and equal protection of the laws under the United States Constitution, which argument was upheld based on the Georgia rule which by implication rejected the constitutional objections raised by the petitioner.

3. The petitioner's timely Request to Charge on the law of manslaughter was refused by the trial court and alleged as a deprivation of due process and equal protection of the laws and a deprivation of the privileges and immunities guaranteed under the United States Constitution in Enumeration of Error Number 8 which was upheld by reference to the Georgia Manslaughter Statute but which by implication rejected the petitioner's constitutional objections.

4. Petitioner's objections to the gory color photographs were raised by a Motion in Limine prior to trial and objected to at trial and raised in Enumeration of Error Numbers 5 and 14 on the appeal to the Georgia Supreme Court and were rejected by the Georgia Supreme Court citing Georgia law but by implication rejecting the petitioner's arguments that their introduction before the jury deprived him of a fair trial and due process of law under the United States Constitution.

5. Petitioner's objection to the trial court's charge on the sentencing phase regarding insufficiency of the charge on mitigating circumstances was raised by Enumeration of Error Number 13 to the Georgia Supreme Court. This aspect is required to be reviewed by the Suprdme Court of Georgia under the Statutory Scheme and the

process of law and the equal protection under the laws and a fair trial under the United States Constitution.

6. The trial court's failure to charge the defendant's request to charge Number 8 regarding criminal intent was excepted to at the proper time and alleged as Enumeration of Error Number 23 in the appeal to the Georgia Supreme Court. There it was argued that the denial of this charge, which accurately stated the law in Georgia, and which contained petitioner's legal defense, deprived him of the due process of law and a fair trial which argument was rejected by the Georgia Supreme Court without citation but by implication rejecting appellate's constitutional arguments.

7. The reading by the District Attorney from the facts of a similar Georgia Supreme Court case infront of the jury was objected to at trial and raised on appeal as Enumeration of Error Number 32 to the Georgia Supreme Court where petitioner argued that it was a violation of due process and denied him his right to a fair trial before an impartial jury. The Georgia Supreme Court rejected this argument citing a State law and a Georgia Supreme Court case in Division 13 of the opinion but by implication rejecting petitioner's constitutional objections to the procedure.

8. Petitioner's objection to the Statutory Scheme of the Georgia Death Penalty is fairly comprised within petitioner's pre-trial Motion to Dismiss the Indictment which challenged the constitutionality of the death penalty and the entire Statutory Scheme for its imposition in Georgia. Although not argued in the terms raised here the Georgia Supreme Court's upholding of the entire Statutory Scheme impliedly rejects and thus decides such a question.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. a. The death sentence in this case deprives the Petitioner of due process of law and should be declared void because the jury only made a partial finding of the seventh aggravation circumstance under GCA Section 26-2534.1 b.

Under the Georgia Statutory scheme, the jury must find at least one "aggravating" circumstance before a death sentence can be imposed. The seventh aggravating circumstance which was the only one submitted to the jury in this case is that the offense be:

> "Outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" GCA Section 27-2534.1 b 7.

In this case, the jury found on both counts of murder that the death sentence should be imposed because:

> "The offense was outrageously and wantonly vile, horrible, and inhuman."

Petitioner submits that this partial finding of the "catch-all" aggravating circumstance is incomplete under the law and should void the death sentence on the ground that it deprives him of his life without the process of law. Petitioner submits that such an incomplete finding of the aggravating circumstance is void, the same as no finding of the statutory aggravating circumstance at all and would be analogous to a hung jury on the sentencing phase which would require the imposition of a life sentence. See Miller v. The State, 237 Georgia 557 at 559.

The Supreme Court of Georgia has previously indicated that it does not regard the adjective or first phrase of b 7 as severable from the second or illustrating phrase which begins with "in that it involved".

> "We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhuman." Harris v. The State, 237 Georgia 718 at Page 733, (Emphasis supplied by counsel)

The jury's findings on the sentencing phase is an incomplete verdict because the statutory language requires the language set out in the jury's findings to be further qualified by the words, "in that it involved torture, depravity of mind or an aggravated battery to the victim." That is, the second part of the statutory aggravating circumstance qualifies and completes the description begun in the first part of the sentence. In this case the prosecutor told the jury that there was no torture involved, and counsel would submit that torture and aggravated battery are substantially similar treatment of the victim, which leaves only "depravity of mind" as relating to the Defendant. Therefore, under the circumstances of this case, the jury's findings should have been that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind." Counsel suggests that the absence of "depravity of mind" in the finding under the facts of this case, where there was substantial evidence relating to the mental state of the Defendant at the time the acts were committed, appears at the least, highly suspicious.

Petitioner submits that this line of reasoning would apply very obviously to some of the other statutory aggravating circumstances, such as b 5: "The murder of a judicial officer... during or because of the exercise of his official duty' is perfectly obvious that a finding of a judicial officer being murdered without the further finding that it was related to the exercise of his official duty, would clearly be void. So the question becomes, if this is a valid line of analysis of Section b 5, then why would it not clearly apply to Section b 7 which is the aggravating circumstance most subject to capricious abuse?

The Supreme Court of Georgia dealt with this argument as follows: "The evidence supports the jury's finding of statutory aggravating circumstances, and the jury's phraseology was not objectionable." Slip opinion, pages 14, 15. To allow a death sentence such as the one rendered in this case to stand on such a partial finding of an aggravating circumstance would be tantamount of holding that GCA Section 27-2534.1 b 7 is composed only of the adjective phrase, that is, that the offense is vile, horrible or inhuman. Since this language, standing alone, could so clearly be applied to any murder, Petitioner submits that this would render the seventh act statutory aggravating circumstance invalid and unconstitutional under Gregg v. Georgia, 96 Supreme Court, 2909, as applied to the facts in this case. The application of the death penalty in Georgia would then be wholly "open-ended" and totally subject to the total discretion and caprice of juries.

In the recent Georgia Supreme Court case of Kermit Elmer Holton v. The State, Number 34272 decided March 6, 1979, a similar circumstance, the inverse of the finding in Godfrey, was dealt with as follows:

> "The jury fixed the punishment on both counts of murder as death (by reason of depravity of mind)."

This is only a part of the statutory aggravating circumstance. It omits all reference to the words "outrageously or wantonly vile, horrible or inhuman." See Code Annotated Section 27-2534.1 b 7. See also Ruffin v. State, Number 33865 decided January 24, 1979; Godfrey V. State, Number 34256 decided February 27, 1979.

> "It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive a constitutional challenge based on Furman v. Georgia, 408 US 238 (92 Supreme Court 2726, 33 Lawyers Addition 2nd 346) (1972); i. e. such an aggravating circumstance could be so broad as to allow the death penalty to be imposed at random in any murder case. See Gregg, v. Georgia, 428 US 153 (1976). Here, however, although the jury was polled, the Defendant did not object to the form of the verdict at the time of its return. Because there is to be a resentencing trial (see below) this problem should not arise again." Pages 10 thru 11 the Slip opinion attached hereto as Appendix C (emphasis supplied by counsel)

The form of the verdict in Godfrey was likewise not objected to at trial. However, suggesting this as a fatal defect to its consideration is a little like holding that the condemned man on the scaffold with the noose around his neck has an obligation to point out that the hanging rope looks a bit too frayed to hold him. In this country we have constitutional safeguards against forcing self-incrimination, certainly this would include self-prosecution.

Petitioner respectfully requests this Honorable Court to hold this part of the Georgia death statute unconstitutional in its application against him in order that his sentence be reduced to life in prison.

(b) By upholding the death sentence on this partial finding of an aggravated circumstance and upon the facts of this domestic killing involving powerful emotional provocation, and substantial evidence of reduced mental capacity, the Supreme Court of Georgia has adopted the open-ended construction of this seventh aggravating circumstance disapproved by this Honorable Court in Gregg vs. Georgia.

This Court in Gregg vs. Georgia, 49 Lawyers Addition 2nd 859 (1976) responded in part to the attack on the breadth and vagueness of the seventh aggravating circumstance as follows:

> "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a Defendant to death when the only statutory aggravating circumstance found was that of Section 7, see McCorquodale v. State, 233 Georgia 369 (1974), and that homocide was a horrifying torture murder..." (49 Lawyers Edition 2nd at 890).

The Georgia has previously indicated that it would not allow this open-ended approach:

> "Each of these cases is at the core and not the periphery, and we intend to restrict our approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core. See Florida's approach to a similar problem in State v. Dickson, 283 Southern 2nd 1 (1973). cited with approval of the Supreme Court of the United States and Proffitt v. Florida, 96 Supreme Court 2960 (1976)."
>
> Harris v. The State, 237 Georgia 718 at Page 733.

Contrary to this Court's expectations, the seventh circumstance has not been narrowed. Rather, the Georgia Supreme Court has, in its decision since Gregg and most clearly in this case, adopted the open-ended approach and left the provision's application to the unguided, capricious descretion of juries.

In the case subjudice, there was strong psychiatric testimony favorable to the Defendant to the effect that due to a dissociative condition, the Defendant was unable to control his actions and unaware of what he was doing. Also, the victims were his wife and mother-in-law with whom his wife was living at the time awaiting a divorce action the following day, and who had vigorously encouraged his wife to finally put an end to the marriage. There was evidence that their marital history had been stormy, highly emotional and at times violent; that his wife had committed him to Milledgeville State Mental Hospital on three previous occasions; and that there had been highly emotional arguments between them by telephone shortly before the shooting. The law has always recognized that this type of killing, where enormous

emotions and long pent up passions are finally released, are different in degree from the cold-bloodied, torture-robbery type murders of strangers involved in the cases cited by the Georgia Supreme Court in its Appendix to its decision in this case.

Because of the facts of this case, and the upholding of the partial finding of the seventh aggravating circumstance, it is absolutely clear now, if not before, that the Georgia court's application of the seventh circumstance can now be classed as too vague under the due process clause and the 8th Amendment as incorporated in the 14th Amendment, counsel submits to this Honorable Court that what one individual may reguard as vile, or horrible or inhuman, some other individual may not. These are words that are subject to a highly subjective, personal interpretation and are not objective enough to meet Constitutional objections as to vagueness, particularly where there are no further guidelines provided in the standard Georgia sentencing charge. One only has to look to various cultures of the world to see that all human beings are not in agreement on what is horrible or inhumane or vile; a practice in one culture may be perfectly acceptable there and viewed as horrible and inhumane or vile in another culture; counsel submits that the same may be true of individuals within a particular culture. Therefore, the seventh aggravating circumstance, as applied to the facts of this case, cannot withstand Constitutional scrutiny and this Petitioner's death sentence should be declared void therefor.

(c) The statutory death sentence review conducted by the Supreme Court of Georgia in this case was so superficial, and thus insufficient under this Court's expectations and Gregg, as to have violated the Petitioner's rights to the due process of law and equal protection of the law as guaranteed under the Constitution of the United States.

The Georgia mandatory appeal process was assumed in Gregg to be a necessary part of avoiding arbitrary and capricious, and thus unConstitutional imposition of the death penalty. 428 U.S. at 198 201, 220, 223.

Under the statutory scheme, the Georgia Supreme Court is under a duty, when reviewing a death sentence, to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, concerning both the crime and the Defendant; GCA 27-2537 b 3; and is required further to include in its decision a reference to those similar cases which it took into consideration. GCA Section 27-2537 e. Conversely, counsel submit that if the facts of the case subjudice are substantially dissimilar with the facts of cases cited as similar, then the sentence of death would be excessive or disproportionate and should not have been approved by the Georgia Supreme Court. For this statutory required comparative analysis, the fact of murder is necessarily presupposed, so that what must determine the issue is the manner in which the crime is committed, i.e. whether it involved torture, etc. This follows from the fact that to do otherwise where the seventh statutory aggravating circumstance is involved, would be to adopt the disapproved "open-ended" interpretation of it, and sustain death penalties where the only similarity, as here, is the fact of death and that a gun was used.

In considering this aspect of the case, the Georgia Supreme Court found as follows on Page 16 of the Slip opinion:

> "In reviewing the death penalty in this case, we have considered the cases appealed to this Court since January 1, 1970, in which a death or life sentence was imposed and we find the similar cases listed in the Appendix support the affirmance of the death penalty in this case. Robert Franklin Godfrey's sentence to death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the Defendant."

The cases listed in the Appendix to the Georgia Supreme Court's opinion which are supposedly similar to the facts of this case are as follows:

> House v. State, 233 Georgia 140 (1974) where the Defendant was found guilty of strangling two seven year old boys to death after committing anal sodomy upon them; Gregg v. State, 233 Georgia 117, (1974) where the Defendant whipped, burned, bit and cut his bound victim, put salf on her wounds and sexually abused her prior to strangling her; Floyd v State, 233 Georgia 280 (1974) where the Defendant entered a stranger's home under pretext of using the telephone and killed the victim while forcing a child to witness it; Chenault v. State, 234 Georgia 216 (1975) where the Defendant killed Mrs. Martin Luther King, Sr. in a crowded church, creating great risk of death to more than one person, Section 3 aggravated circumstance; Smith v. State, 236 Georgia 12 (1976) where a couple killed the wife's former husband for the insurance money; Burt v. State, 236 Georgia 815 which was murder and armed robbery; Coleman v. State, 237 Georgia 84 (1976); Isaacs v. State, 237 Georgia 105 and Dungee v. State, 237 Georgia 218 (1976), companion cases where they entered a home for the purpose of burglary and killed six members of the family; Banks v. State, 237 Georgia 325 (1976) where the Defendant killed a strange couple in the woods under circumstances held to show torture (which was taken from the jury by the District Attorney subjudice); Young v. State, 239 Georgia 53, three murders in the commission of burglarly; Gaddis v. State, 239 Georgia 238 (1977), companion case to Burt, murder and armed robbery; Peek v. State, 239 Georgia 422 (1977), where the Defendant accosted a strange couple, murdered the man and kidnapped the one woman; Westbrook v. State, 242 Georgia 151 (1978), where the Defendant with a companion was cutting the grass at a home and kidnapped and murdered two members of the household.

Even the most superficial comparison would indicate that the cases cited in the appendix by the Georgia Supreme Court bare no real similarity to the facts of this case. This case would fall into the category of "domestic" killings committed under circumstances showing serious emotional provocation with substantial physchiatric testimony as to temporary insanity and inability of the Petitioner to form the requisite criminal intent at the time of the killings. All of the cases cited in the appendix by the Georgia Supreme Court involved murders of strangers mostly in the commission of burglaries or armed robberies. Historically, cases of the domestic sort have been accorded a different degree from those cited in the Georgia Courts Appendix to the opinion. The Petitioner also asserts in this Appeal elsewhere that he was entitled to a manslaughter charge under the facts of this case but even if it is not technically manslaughter under the strict wording of the Georgia Statute, there are certainly mitigating facts about it which distinguish it from the cases cited as similar by the Georgia Court. It is also clear that the Georgia Court did not consider the "both the crime and the Defendant", or give any consideration to this Defendants having lived a crime-free and constructive life prior to the killings. This Petitioner is not the type hoodlum and career criminal as was involved in most of the cases cited by the Georgia Court in the appendix.

In the review conducted by the Georgia Supreme Court, there was no consideration of other domestic killings where the verdict had been voluntary manslaughter or life imprisonment which had been appealed. It certainly failed to examine non-appealed capital convictions where life sentences were imposed or where capital conviction was not obtained or where by plea bargain the Defendant was allowed to plead the voluntary manslaughter to avoid a murder trial. All of these factors were assumed by this Court in Gregg to be important aspects of a thorough and meaningful sentence review in which this Court expected to be considered. What we have in Georgia now is a thoroughly standardless, uncategorized and thus meaningless sentence review.

The facts of this case, when compared with those listed in the appendix to the Georgia Courts Opinion, stand out as dissimilar in the extreme. However, if the staff of the Georgia Supreme Court had undertaken a thorough review of all those cases in Georgia where domestic killings had resulted in life sentences, convictions of voluntary manslaughter or plea bargains for voluntary manslaughter, this case, on its particular facts, would appear very similar. It would then be perfectly clear that the death sentence in this case is excessive and disproportionate to the sentences and results in cases of a similar nature. Counsel would submit that this undertaking, to show this result, would not have to go beyond the borders of Polk County, one of one hundred fifty nine counties in the State of Georgia. This Petitioner is aware of the facts of a case which occurred a few months after Godfrey's conviction in Polk County "because I represented the murdered wife in divorce proceedings pending then against her husband and killer" where the husband, the day after the temporary hearing in the matter, went to his wife's house with a gun and shot his wife through the window from outside the house where she was standing just inside a window with her boyfriend, killing her and then severely injuring the boyfriend who was shot as he crossed the yard and saved himself by entering a neighbor's back door. The killer clearly went to the house intending murder and it is a great irony that a plea bargain was allowed under the circumstances when the killer was also engaged in an ongoing adulteress relationship of long standing. This murderer was then allowed to plead guiity to voluntary manslaughter in Polk Superior Court upon the recommendation of the same prosecutor who convicted Godfrey and sentenced by the same Judge to twenty years. He will probably serve seven years at most.

This set of circumstances, which counsel submits is repeated enumerable times in this and other states, shows without question that the process by which the law deals with those charged with murder is still so fraught with capriciousness and discretionary actions at every procedural step that the death sentence cannot withstand the scrutiny of the analysis in Furman v. Georgia. In this case and generally since Gregg the manner in which the Georgia Supreme Court has conducted the required "sentence review" has rendered meaningless that "important additional safeguard against arbitrariness and caprice", 428 U. S. at Page 198, and therefore denied the due process of law as expected by this Court.

II. The dismissal of Petitioner's challenge to the constitutional composition of the Grand Jury which indicted him, and thus to the entire jury list under Georgia law, on the grounds that it was not timely filed because it was filed after the indictment was rendered, even though such filing was over a month before arraignment deprived the Petitioner of the due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Counsel for the Petitioner filed a plea in abatement seeking to quash the indictment against him on the grounds that the Grand Jury that rendered it was unconstitutionally composed was filed on January 31, 1978 and heard on February 9, 1978. The Defendant's arraignment date was March 3, 1978 and the trial March 6, 1978. Unknown to the Defendant and his counsel, Petitioner had previously been indicted on December 15, 1977 when the August Term Grand Jury had been called back in for a Special Session for the purpose of indicting this Petitioner. It was disputed as to whether counsel actually represented the Petitioner at the time the indictment was rendered.

Upon the hearing of the Motion the District Attorney moved to dismiss the plea and abatement on the grounds that it was not timely filed and cited Henton v. The State, 223 Georgia 174, and Blevines v. The State, 220 Georgia 720, as controlling precedent in the matter. The Court granted the District Attorney's motion to dismiss over various objections on the part of counsel for Petitioner.

The Petitioner submits to this Honorable Court that any procedure whereby substantial constitutional right of a criminal Defendant can be held to be waived when neither that Defendant nor his counsel have been accorded notice and opportunity to file appropriate objections, is highly suspect, and presents a serious and easily recognizable violation of the due process of law under the Constitution of the United States.

The rule in Georgia as set out in Henton and Blevines has been repeated in a long line of cases for many years without any analysis or reasoning, and that is, that a challenge to the legality of the Grand Jury must be brought before indictment. The issues in the early cases when the rule was adopted in the 1880's involved mere technicalities having to do with the drawing of jurors and the calling of jurors for service out of order, and the misnaming of jurors. Whereas in modern times since Taylor v. Louisiana, 419 U. S. 522 (1975) and other cases dealing specifically with Grand Juries, it has been established as a substantial constitutional right to have a fair cross section of the community represented on the Grand Juries and thus under Georgia Law the entire jury list from which Grand Jurors and the venial panels are chosen. Thus, Petitioner submits that the question must be answered, what substantial, compelling interest does the State have in such a rule as compared to the substantial constitutional right that criminal defendants have concerning the composition of Grand Juries and jury list?

An analysis of the early cases shows clearly that the state's interest in this rule is very slight and is mainly to prevent frivolous issues from being raised interminably upon the trial of cases. However in this case, the motions were made over a month before arraignment. The modern Georgia rule seems to had its inception in the case of Turner v. State, 78 Georgia 174 (1886). Turner involved the question of whether a man serving on a Grand Jury with a similar name to the man named on the Grand Jury list was the wrong person. This can hardly be said to rise to a constitutional issue and importance. Thus the reason for the rule as stated in Turner was, "the reason is, that he must fight in limine, if it makes a point arising in limine, and not wait until the bill is found true and he is arraigned and on trial before the traverse jurors."

The Turner case inturn cited Williams v. The State, 69 Georgia 11, which concerns a plea in abatement filed after indictment which alleged that "no precept has ever been issued or ordered for the summoning or attendance of jurors at this special term nor have any jurors either grand or petite been summoned or sworn under a precept as required by law". Regarding the Georgia Supreme Court's opinion of the gravity of that matter, as opposed to the present constitutional gravity of the matter sought to be raised. The Court stated on Page 27 as follows:

> "It is doubtful whether it be important to inquire about such matters at all...and if, on the trial of the criminal, all such details were opened to investigation, the trial would be interminable...if, however, it be deemed important in a particular case to fight the prosecution in limine, diligence requires that the challenge be made before the bill is found."

Petitioner submits that it is readily apparent that the genesis of the present Georgia rule was had in matters that the Court assign little importance to. Since cases recently decided by the United States Supreme Court, in Georgia cases decided thereunder, have designated the make up of the Grand Jury and venial list as involving a substantial constitutuional right, it seems that the time has come to specifically overrule the application of the Henton and Blevines holdings under the facts and circumstances

of this case. Counsel would further point out that this Court subsequently reversed Henton as subnom, Anderson and Henton v. Georgia, 390 U. S. 206 (1968), in a per curiam decision without a written opinion in which the Court merely granted the writ of certiorari and reversed the case citing Whitus v. Georgia, 385 U. S. 545. Although the reversal was not explained, Petitioner would submit that this Court has already impliedly held the rule in Henton and Blevines to be unconstitutional.

In any case, Petitioner submits that there is a line of old Georgia cases concerning pleas in abatement that specifically uphold a plea as a proper method to attack a defective Grand Jury after the true bill has been rendered, so long as it is prior to or at arraignment. Reich v. The State, 53 Georgia 73; Fennigan v. The State, 57 Georgia 427; and Tompkins v. The State, 138 Georgia 465. In Reich, the Defendant filed a plea upon arraignment alleging that one of the Grand Jurors that sat on the Grand Jury indicting him was an alien and not qualified to sit on the Grand Jury. The trial Court dismissed this plea and on appeal the Georgia Supreme Court held in part as follows:

> "There are some authorities seemingly to the effect that the challenge must be to the jury before the bill is filed; but it seems to us that this is unreasonable. How is a Defendant to know that this secret inquest is proceeding to find a bill against him? Whatever objections there may be to a Grand Juror that a party can make ought to be made on the trial and before pleading to the merits, and such, we think, was the practice in England", Reich at Page 75.

In Fennigan, a plea in abatement was filed by the Defendant at arraignment alleging that the Grand Jurors were unlawfully drawn. The trial Court sustained the State attorneys demurral and on appeal the Supreme Court of Georgia reversed holding in part as follows:

> "We do not say that if the defendant, with a full knowledge of the facts, had gone to trial without raising any objection to the indictment, that he could have taken advantage of it after verdict, but the Defendant in this case did not wait and take his chance for an acquittal until after verdict; he pleaded to the indictment on arraignment, as required...and in our judgment, the Court erred in sustaining the demurral to the defendants plea in abatement to that indictment.
>
> Whenever the State undertakes to deprive one of its citizens of his life or liberty, it is the duty of the Courts to see that it is done in accordance with the laws of the land and not otherwise. In the administration of criminal law, judicial discretion should not be tolerated. The law, as it is prescribed by the Supreme power of the State, should be the rule of conduct for the Courts as well as for the citizen."

Thus it appears that the original rule in Georgia was based on substance and due process whereas the more recent Georgia rule was adopted by the Courts as a matter of expediency in matters it considered of little importance. Petitioner submits to this Honorable Court that the procedure in the trial court in this matter violates well established principles of due process and that the whole proceeding should be reversed and declared null and void.

3.

THE COURT'S FAILURE TO GIVE A REQUESTED CHARGE ON THE LAW OF MANSLAUGHTER UNDER THE FACTS OF THIS CASE WHERE THERE WAS SUBSTANTIAL EVIDENCE OF EXTREME EMOTIONAL PROVOCATION, AND DIMINISHED MENSREA, DENIED THE PETITIONER THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

On the trial of the case counsel for the petitioner timely and in writing requested the court to charge the law of manslaughter in Request to Charge Number 20 and the trial court denied this request and counsel made appropriate objections. (TR-545)

In the Supreme Court of Georgia's opinion at Page 7, the Court held that, "there was no evidence in this case of sudden violent and irresistible passion resulting from serious provocation to warrant charging on voluntary manslaughter under Georgia Code Annotated Section 26-1102. "

The voluntary manslaughter statute in Georgia under 26-1102 is as follows:

> "A person commits voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder, if he acts solely as a result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killings sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder." (Emphasis supplied by counsel)

Petitioner submits that the testimony in the record from the defendant and from the Defendant's psychiatrist, Dr. Davis, establishes that the defendant was impelled into a dissociative state by virtue of the serious emotional impact of the second telephone call from his wife, as set out in the Statement of Facts. Petitioner submits that this psychological abnormal state is analogous to an irresistible passion and that the question of provocation was a matter to be weighed by the jury and not determined solely by the court.

The law in Georgia respecting when such a charge may be given is that on the trial of a murder case, if there be any evidence, however slight, as to whether the offense is murder or voluntary manslaughter, instruction as to the law of both offenses should be given to the jury. Banks V. State, 227 Georgia 578 at page 580.

The petitioner submits that the type of provocation which excites the irresistible passion or impulse is the question of fact for the jury to determine under appropriate guidelines as given by the court in the charge. The petitioner submits that he was substantially prejudiced, and deprived of due process and equal protection of the laws, by the removal of this option from consideration of the jurors, and the argument of counsel that could have been made to the jurors on this issue, and submits that purely emotional provocation as a basis

submits that purely a emotional provocation is recognized as a basis for manslaughter under the laws of other jurisdictions if not Georgia and thus deprives this petitioner of equal protection and privileges and immunities of the law. For instance, in California there is a non statutory voluntary manslaughter which is a homicide which may be intentional voluntary deliberate premeditated and provoked. It differs from murder in that the element of malice has been rebutted by a showing that the defendant's mental capacity was reduced by mental illness, mental defect, or intoxication. People V. Graham, 71 California 2nd at 315. This type of voluntary manslaughter was distinguished in California from involuntary manslaughter by the presence of intent to kill. Therefore, if the prosecution charges a defendant with murder in the first degree and the defense can show that due to mental disease, defect or intoxication or a combination thereof the defendant could not materially or meaningfully reflect upon his act, harbor a malice aforethought, and form a specific intent to kill, his offense could be no greater than involuntary manslaughter under California law. People V. Mahle, 10 Criminal Law Reporter 2149 (California Appeal 1971). Criminal defense techniques , Volume Two, edited by Robert M. Sipes, Pages 32-14 through 15. Also counsel for the petitioner would cite the highly publicized case in New York last year where a Yale student was visiting his alleged fiancee at her home in New York where she rejected him while at her parents home whereupon the young man murdered her with a claw hammer. At Yale defense fund was formed to support the young man because of his previous good record and upon the trial of the case, he was convicted of voluntary manslaughter.

Petitioner submits that in a matter of life and death, he should not be denied the privileges and immunities and equal protection of the laws accorded to citizens in other States in the Country and thus urges this Honorable Court to accept this question for further review.

THE SHOWING OF GRUESOME, GORY COLOR PHOTOGRAPHS TO THE JURY, WHERE THE EVIDENTIARY BASIS FOR THEIR ADMISSION WAS TENUOUS, IF NOT NON-EXISTENT, AND WAS CERTAINLY CUMULATIVE, WAS SO INHERENTLY PREJUDICIAL AS TO HAVE VIOLATED THE PETITIONER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Prior to trial in this case after viewing by counsel of the photographs in question, a Motion in Limine to exclude them from the trial was filed and heard on February 9, 1978 at which the trial court delayed the ruling until the photographs were presented at the trial. They were subsequently presented at trial and admitted over numerous and vigorous objections by petitioner's counsel that they were irrelevant, cumulative, and because of the gruesome nature would only tend to inflame the minds of the jurors against the petitioner. The objectionable photographs are in the record as State's Exhibits Numbers five, six, seven, fifteenth, and sixteen, and counsel for the petitioner is requesting the Clerk of the Superior Court of Polk County to transmit these photographs to the Court pursuant to Rule 21 (1) of this Court.

Although the photographs of victims have been held admissible in numerous cases in Georgia, there has always been some relevancy shown by the State. It has usually been an instance where the positions or the angles of the shots were important or because of the nature of the wounds were important because of some issue raised by denial on the part of the defendant. However, in this case, the defendant admitted on the stand that he must have done the killings, even though he had no recollection of the event and there was no issue whatsoever as to identification, fact of death, and cause of death, the testimony of Dr. Farrell, the medical examiner, and of Sheriff Swafford was very explicit as to the cause of death, the position of the bodies in the trailer, the nature and description of the wounds, their gruesominess and the positions of the windows, doors and angle of shots fired. Petitioner submits that none of these things were in dispute, or issues for the tryers of fact, and therefore, the photographs were not revelent to any contested issue, were merely cumulative, and intended solely and without question, to improperly prejudice the jury against the defendant in a close case involving a technical defense and therefore depriving him of a fair trial and the due process of law. The only real issue on the trial of the case at the guilt or innocent stage upon the jury had to give any serious consideration, was the state of mind of the defendant at the time the acts were committed and whether or not he was insane or able to form the requisite criminal intent.

Even though there are numerous cases in Georgia upholding the right of the State to enter these photographs, petitioner presented the following language from an opinion by the highly regarded Chief Justice Duckworth to the Georgia Supreme Court on the appeal of this case:

> "It might insure a fairer trial to exclude gruesome photographs of a slain person unless they serve a real purpose in proving the material elements of the case. Their introduction when they can serve no purpose but to show a terrible corpse is an excitement of passion against the accused, and the law should not allow a trial for life to be clouded with passion." Edwards V. State, 213 Georgia 552.

In Division Two of the Georgia Supreme Court's opinion this question was decided against the petitioner at pages 4 and 5 of the opinion wherein the Court concluded as follows:

> "We agree with the State that a criminal defendant has no right to prevent the jury from seeing the crime scene and the victim's injuries. The trial court did not err in admitting these photographs."

It is significant to note that the Georgia Supreme Court did not even attempt to suggest a valid evidentiary basis for the admission of these photographs. It merely upheld, without citation to any authority, that the jury has the right to see the victims injuries. Plain common sense tells us that photographs of this gruesome sort, particularly in a case where the defense was of such a technical nature, will inflame the jurors against the defendant and predeposed them to decide a close technical question in favor of the State contrary to the basic and fundamental constitutional rights of criminal defendants in the United States. That their introduction was intended by the State to inflame the minds of the jurors is evidenced by the fact that the District Attorney had in his possession black and white photographs of the same subject matter, from the same angles, as displayed in the Exhibits objected to on the trial of this case. The black and white photographs were not offered by the District Attorney in evidence because they by his own statement, would have been merely cumulative and repetitive.

Many of the great philosophers in history and great writers have said that in order to discover truths about human beings, one must first look inside oneself for it and then generalize it to mankind. Counsel for the petitioner had such an experience, related to the point in question, when he first saw the photographs when made available approximately a month prior to trial by the District Attorney. When counsel saw the pictures he experienced such a feeling of disgust toward the man who had done such a thing that he wondered to himself what in the world he was doing spending so much of his time, that he knew would be poorly compensated, in the defense of this man; this feeling lingered with counsel for several days. Therefore, counsel reasons that the jurors on this case, during their deliberations for approximately two hours before returning a verdict of guilty on both counts of murder could not possibly have overcome the same feelings and deliberated dispassionately, objectively, and rationally upon the highly technical defense of the petitioner. Petitioner submits to this Honorable Court this is an undeniable truth of which the Honorable Justices may take judicial notice after reviewing these photographs. Because of this, this petitioner was denied a fair trial.

5.

THE FAILURE OF THE TRIAL COURT IN ITS CHARGE ON THE SENTENCING PHASE TO SPECIFY OR ELABORATE REGARDING PARTICULAR MITIGATING CIRCUMSTANCES INVOLVED IN THIS CASE OR RELATED TO THIS PETITIONER, VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Court's brief charge on the sentencing phase of the trial of this case is set out as follows:

> "Ladies and Gentlemen of the jury, it is now your duty to return to the jury room and fix punishment in this case as to Count One and Count Two. Code Section 26-1101 (c) provides 'a person convicted of murder shall be punished by death or by imprisonment for life. Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral capability or blame. Aggravating circumstances are those which increase the guilt or enormity of the offense, or add to it injurious consequences.'
>
> In determining your verdict in this case you shall consider any mitigating circumstances which you find, and you may consider any of the following aggravating circumstances which may be supported by the evidence. That the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. In the event you fail to find an aggravating circumstance or circumstances beyond a reasonable doubt you would fix punishment at life imprisonment, and even though you find the existence of a statutory aggravating circumstance or circumstances, you could recommend a life sentence. In the event you determine that your verdict will be a recommendation of death, you shall designate in writing the aggravating circumstance or circumstances which you found beyond a reasonable doubt.
>
> Now, this charge that I have given you is typed and is to be sent out with you. You may refer to it to guide you in your deliberations. I also have prepared two verdict forms, one as to Count One and one as to Count Two. Again these forms in no way should intimate or suggest to you what your verdicts should or should not be. Your verdict is entirely up to you. It must be unanimous, all twelve of you must agree to your verdict, take into consideration all of the previous charge which I have given you. You may return to the jury room to deliberate as to punishment as to Counts One and Two." (TR-578-579)

Petitioner would point out that in the District Attorney's statement to the Court, before the jury on his argument on the sentencing phase both torture and aggravated battery were completely withdrawn from the consideration of the jury as a part of the aggravating circumstance. (TR-570,571)

Petitioner submits that the charge given by the trial court on the sentencing phase was insufficient as a matter of law and did not fully explain to the jury their options and the results of certain actions the jury could have taken. Counsel submits that the charge was improper and biased in that, whereas specific aggravating circumstances were set out, nothing but a general reference to mitigating circumstances were set out, and no mitigating circumstances in particular were enumerated by the judge to allow the jury to be aware of what might be considered by them in weighing same against the aggravating circumstances in order to determine whether a life sentence should be granted rather than the death penalty as was clearly anticipated by this Court in Gregg V. Georgia, and its campanion cases. The constitutionality of the jury instructions approved by the Georgia Supreme Court on this question is presently before the Court in AlphonsoMorgan V. State of Georgia, Number 78-6140, October Term, 1978 and petitioner adopts the arguments made therein and the supporting data attached thereto by Appendix.

Petitioner further submits that when the defense of insanity has been raised, and such competent evidence supporting the contention has appeared as in the record of this trial, the Court is under a duty, whether or not requested, to charge the jury that psychiatric testimony concerning the diminished capacity of the defendant, even though not rising to the level of insanity, should be considered by the jury as a mitigating circumstance. Petitioner submits the Court should also have indicated to the jury that it could consider his character and previous life without criminal record as a mitigating circumstance.

Petitioner further submits that the Court should have charged, whether or not requested, that in the event that any single juror, by his opinion reached independently could not be convinced beyond a reasonable doubt that the death penalty should be imposed, then that would mean that the jury could not reach a verdict on the issue and as a matter of law, the Court would have to impose the life sentence. In capital cases such as this one, petitioner submits that the trial court has an obligation to explain to the jurors that each juror, independently, has the power of life and death, and that each juror should not give up his or her individual conviction in order to agree with other jurors. Therefore, petitioner submits that he did not receive the informed, individual, and independent judgment of each juror and was substantially prejudiced thereby. Hawes V. State, 240 Georgia 327; Fleming V. State, 240 Georgia 142; and Jureck V. Texas, 428 US 262, 271 (1976).

6.

THE TRIAL COURT'S FAILURE TO GIVE THE DEFENDANT'S REQUEST TO CHARGE NUMBER EIGHT, WHICH TIED TOGETHER VARIOUS ASPECTS RELATING TO PROOF OF CRIMINAL INTENT, AND WHICH CONCISELY, AND LEGALLY, STATED THAT GEORGIA LAW UPON WHICH PETITIONER'S DEFENSE WAS BASED IN ESSENCE, VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW, AND A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Counsel for the Appellant timely and properly presented the Defendant's Request to Charge Number Eight to the trial judge. The trial court refused to give the charge and counsel made proper objection after the jury retired. The requested charge is set out as follows:

> "As I may have previously stated, the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.
>
> This presumption may be rebutted by evidence that the act was due to reflex or some other involuntary influence, such as hypnosis or mental defect, which produced the action while inhibiting the actor's will. If you find from the evidence before you in this case this presumption has been rebutted by some competent evidence, then you must give careful consideration to whether or not the State has proved the mental element, or criminal intention of the crimes charged beyond a reasonable doubt.
>
> Criminal intention is an essential element of each crime charged and the burden is always on the State to prove it beyond a reasonable doubt. Therefore, under the law, a person will not be presumed to act with criminal intention.
>
> So if you find from the evidence before you that the State has not proved the mental element, or criminal intention, of the crimes charged beyond a reasonable doubt, or if you have a reasonable doubt concerning this essential element of the crimes charged, then you must acquit the defendant."

Petitioner submits that this was a valid charge and is supported in Georgia Code Annotated Sections 26-603 and 26-605 and also Grace V. Hopper, 234 Georgia 699, and Coker V. State, 234 Georgia 555; see also Wilson V. State, 9 Georgia Appeals 74. The second paragraph of the charge is suggested by the committee notes in the Georgia Code following Chapter 26-6 on Pages 88 and 89, which notes are set out in pertinent part in Appendix B hereto.

While some of this charge may have been set out in the Court's charge in various places, petitioner submits that he had a right to have this important idea in the law drawn together in one cohesive charge. Counsel submits that it is impractical to assume that inexperienced laymen can pull together such a complicated concept and see it whole when it has hinted at at various places in the Court's charge but never cohesively explained. Since the petitioner's entire defense rested on an argument like or similar to that set out in this Request to Charge Number Eight, petitioner submits that the refusal to give it was unwarranted, severely prejudiced the petitioner, and denied him due process of law and the right to a fair trial. Since the psychiatric testimony in favor of the defendant clearly conceded that the dissociative condition was non-psychotic and therefore not technically amounting to insanity under the law, the whole thrust of the defense hinged on the point made in this requested charge. Since this subtle technical idea was not reenforced to the jury and charged from the bench, it is plainly possible that the jury concluded that the defendant did not have a valid legal defense under the evidence. This is plainly a deprivation of his rights when the requested charge states valid law. For this reason this Court should grant certiorari to review this question.

7.

THE ANTIQUATED GEORGIA PRACTICE OF READING FROM GEORGIA SUPREME COURT CASES, IN THE DIRECTION OF THE JUDGE, AND IN THE PRESENCE OF THE JURY, IS SO INHERENTLY FRAUGHT WITH PREJUDICE THAT IT DENIES THE DUE PROCESS OF LAW AND THE RIGHT TO A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. AND FURTHER, THE GEORGIA RULE ALLOWING SUCH A PRACTICE WAS MISAPPLIED IN THIS CASE BY ALLOWING THE DISTRICT ATTORNEY TO READ THE FACTS OF A CASE FROM A DECISION OF THE SUPREME COURT OF GEORGIA THAT WERE SUPERFICIALLY SIMILAR TO THE FACTS IN GODFREY, IN FRONT OF THE JURY, AND THEREBY VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS, FAIR TRIAL, AND EQUAL PROTECTION OF THE LAWS UNDER THE CONSTITUTION OF THE UNITED STATES.

The law in Georgia is very peculiar and contradictory regarding the reading from the appellate decisions of the State in argument before the Court and jury in criminal cases. Counsel may read law during his argument in a criminal case either to the Court or to the jury if he thinks it applicable to his client's case. This applies to defense counsel as well as the prosecutor. Weatherby V. State, 213 Georgia 188. The argument phase of a criminal trial in Georgia on the question of guilt or innocence, or for punishment in death cases, is a peculiar bifurcated proceeding in this respect when the time for final argument to the jury arises, the District Attorney has the opening usually and proceeds to read law and argue it in the direction of the judge but in the presence of the jury. In this part of the proceeding, so long as he is directing his remarks toward the judge and not in the direction of the jury, he may read from the black letter law out of the case, as well as such facts as are necessary to understond the legal holdings; however, when he takes a few steps or turns in his place and begins to address his remarks to the jury, he may not read facts from case decisions. Georgia Code Annotated Section 24-3319 provides in part as follows:

> "Counsel shall not be permitted, in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the Court as applied thereto, in decisions by the Supreme Court or Court of Appeals."

At the beginning of the District Attorney's argument on the guilt or innocence phase of the trial in this case, Mr. Perrin began in the usual manner by reading legal definitions of murder and insanity to the Judge in the presence of the jury. Then he stated in the direction of the Judge while standing in front of the jury as follows:

> "Mr. Perrin .....now, in regards to criminal responsibility of a person who claims a defense of insanity there is a case that is as near this one as you can make two cases, the case of Reville V. State found in the 235th Volume of Georgia Supreme Court Reports beginning at Page 71. The case was tried or was decided in September, 1975, some three years ago. The law enunciated in that case is still applicable in this State today. In this case the very factual situation as existing here except there is only one killing in that case. Reville killed his wife and when the police got to his home where the killing took place.....
>
> Mr. Holmes .....we would ask that Mr. Perrin read from the law, your Honor, on the case law.
>
> Mr. Perrin ....when the police arrived the appellant surrendered to them and turned over the death weapon, saying, here's the gun, I killed my wife. The the Court said in reviewing that case, after conviction, held that from the evidence of premeditation discussed above and evidence at the trial, that the appellant had an extremely retentive memory of the events before and after the event coupled with the absence of any evidence of insanity or delusion other than the alleged loss of memory at the time of the offense, we can not say that the evidence demanded a finding of not guilty by reason of insanity. The exact case, exactly like this except for the fact that there was only one person, the man's wife, dead and he could remember nothing about the shooting or denied any memory of the shooting.".....(TR-506,507)

In its opinion the Georgia Supreme Court in Division 13 held as follows on this point:

> "The argument challenged was directed to the trial judge on matters of law. Although the jury was present, reading and arguing law is not reversible error." Potts V. State, 41 Georgia 67,75 (1978). (Emphasis supplied by counsel)

The Georgia Supreme Court ruled this way even though it had recently disapproved a similar prosecutorial tactic in Hawes V. State, 240 Georgia 327, at page 336 :

> "We do believe, however, that the remarks by the District Attorney were improper. It would not have been improper for the District Attorney merely to have expressed to the jury the sentiments embodied in the quote from Everhart, supra. However, the District Attorney's attribution of those sentiments to a Justice of this Court with the object of influencing the jury to impose the death penalty was improper and is disapproved. See Croom V. State, 90 Georgia 430."

The District Attorney's brief to the Georgia Supreme Court argues, and the Court apparently relied upon it, that it is proper to relate the facts of a case which are necessary to explain the principle of law decided, and cites Potts V. State, supra, as well as Cribb V. State, 118 Georgia 316. However, petitioner would submit to this Honorable Court that these cases and the exception carved out there are inapplicable to the facts of this case. This follows from the fact that the portion of the Reville case read in front of the jury by the District Attorney in this case states no principle of law whatsoever, but only the facts of the case, very similar to the facts sub judice, and only expressed the Court's opinion on those facts to the extent that the evidence so stated could not be said to demand a finding of not guilty by reason of insanity. This is no principle of law such as we see in the Potts case. In Potts, the case which the Assistant District Attorney was there allowed to recite the facts of, Krist V. State, 227 Georgia 85, dealt with questions regarding venue as applied to a situation where aspects of a continuing criminal enterprise occurred in different jurisdictions. Obviously, a complicated principle of law for laymen to understand without the concrete factual situation also related. Also, the Cribb case in addition to allowing the limited exception to the general rule upon which the State relied, stated as follows:

> "Counsel can not indirectly introduce evidence by reading statements of fact contained in published reports of this or any other court. If it appears that the reading is for the purpose of establishing facts which might influence the jury, it would be the duty of the judge, on objection, to prevent the same. Evidence which in one case produced a given result can afford no guide to a jury on the trial of another. A verdict in one case is no standard of what should be done and what may be argued to be a similar case."

Clearly, the District Attorney read no law to the trial judge, in the presence of the jury; only facts which were obviously intended to prejudice the petitioner's case before the jury. All competent Georgia trial lawyers know the purpose of reading such matter to the trial judge: that purpose is to educate or prejudice the jury in behalf of counsel's case or against the opponent's case. It is manifest that the trial judge in this case had no need to hear the facts of the Reville case, or even principles of law from other cases, from the District Attorney at that stage of the trial, especially since request to charge had already been submitted and ruled upon. Therefore, petitioner respectfully submits that it is a legal fiction to say that the District Attorney may read something to

directly.

Petitioner submits that this procedure against him in the trial of this case had the intended effect of, and in fact did, deprive him of his constitutional right to a fair trial before an impartial jury.

This is also another example of how the Georgia Supreme Court is failing to conduct a thorough sentence review to determine whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. GCA Section 27-2537. Counsel submits to this Honorable Court that the above statement by the District Attorney in the presence of the jury, citing the Georgia Supreme Court as having already ruled on a case like petitioner's in favor of the State could have had no other effect on a layman than to have indicated to him that the Georgia Supreme Court had already concluded that under the facts of petitioner's case he had no legal defense. Petitioner further submits that this was the exact intention of the District Attorney in reading from Reville.

For these reasons, the petitioner asserts that he was deprived of due process of law and a fair trial and urges this Honorable Court to accept this case for further review of the questions raised.

THE GEORGIA DEATH PENALTY STATUTORY SCHEME IS UNCONSTITUTIONAL BECAUSE IT DOES NOT INCLUDE AN OPTION WHEREBY THE JURY MAY RECOMMEND A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE.

Counsel concedes that this particular point was not argued in this fashion below. However, it is fairly comprised within petitioner's blanket allegation in his pre-trial Motion attacking the whole statutory death penalty scheme as unconstitutional. This motion was overruled by the trial court and upheld by the Georgia Supreme Court.

The essence of this argument is that the statutory death penalty scheme in Georgia sets up what is in fact a false choice for jurors to make when considering or deciding between the death penalty and a life sentence. This is so because, petitioner submits, most jurors do not believe a life sentence in Georgia is a true life sentence. It is widely believed amongst the public and therefore jurors, that a man under a life sentence in Georgia can be paroled after seven years. This was the case up until a couple of years ago when public controversy over a spate of armed robbery murders in convenience stores and the resulting policital pressure caused the constitutionally independent Georgia Board of Pardons and Paroles to change their guidelines to 13 years before the first parole consideration for a prisoner under the sentence of life imprisonment. This is widely known and debated public knowledge. Even the Chief Justice of the Georgia Supreme Court has been a central figure in this public debate in recent years arguing vigorously in favor of the imposition of the death penalty and the shortening of the appeals process allowed before the penalty is imposed.

Furthermore, public opinion polls in Georgia show that the great majority of Georgians, and I think citizens in the United States, are in favor of the death penalty. And since those opposed to it are stricken from juries, either for cause, or by discretionary strikes by prosecutors, the jury panels that ultimately decide between death and life sentences are predisposed toward the death penalty. Therefore, in a close case, such as this one, a jury, favoring the death penalty in theory, is in fact making a choice between the death sentence and a sentence of 13 years. This view simply recognizes the true reality of the situation in Georgia, and probably other states as well.

If this reality is accepted, then it becomes clear that the statutory death penalty scheme in Georgia, in fact, improperly favors if not encourages the imposition of the death penalty. Under the aggravating circumstance section B(7) in particular, as applied by the Georgia Supreme Court, this deprived the petitioner, and those similarly situated, of his constitutional rights to due process of law and a fair trial before an impartial jury.

Petitioner submits that the underlying public policy consideration in this area is that society in general, for its self protection and peace, is entitled to have certain persons, who have been convicted of certain designated crimes, permanently separated or removed from the society of law abiding citizens. The true question, which brings due process considerations into play, is in what manner does society accomplish this permanent separation, i.e., by killing the offender by law or by permanent incarceration without possibility of a parole? Either option would satisfy the societal goal, however, a sentence of life imprisonment under present Georgia law would not accomplish the goal of permanent separation from society. Petitioner submits that the true life sentence is the preferred manner of enforcing this societal goal because, on the one hand, the death penalty, aside from moral considerations, is not preferrable because it concedes the right to the State to take life under circumstances where the entire society is not threatened, as in war; there is the further possibility that at some future time the State might use the death sentence against a political opponent and thus endanger the civil liberties of all the people. Whereas, on the other hand, the true life sentence accomplishes the goal but recognizes that judicial procedures are not perfect, and that an innocent man might be convicted. The expense of permanent incarceration, though not very great relatively, should not properly be weighed in such policy considerations. Thus the death penalty, as the more drastic of the two equally efficacious methods of attaining the societal goal is, because of its very final nature and incurably capricious application, an unjustifiable act of pure revenge; and thereby unconstitutionally cruel under the Eighth Amendment to the Constitution of the United States.

Because in Georgia, the ultimate sanction of permanent removal from society can only be accomplished by a death sentence, the Statutory Scheme is fatally defective and deprived this petitioner, and all those similarly situated, of the due process of law as guaranteed in the Constitution of the United States.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

RESPECTFULLY SUBMITTED,

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APPOINTED ATTORNEYS FOR PETITIONER

APPENDIX A

Opinion of the Georgia Supreme Court

Robert Franklin Godfrey V. The State,

234 Georgia 302 (1979)

THE OPINION CAN BE FOUND
IN THE PRINTED APPENDIX VOLUME.

APPENDIX B

Committee Notes to Chapter 26-6

of Georgia Code Annotated

a part of the crime but is simply a consequence of its commission." Jenkins v. State, 14 Ga. App. 276, 80 S. E. 688 (1914).

Under former law, an indictment was sufficient to support a conviction under a Code section which did not prescribe a punishment (e.g., former § 26-2629). See Kimbrough v. State, 101 Ga. 583, 29 S. E. 39 (1897). When this happens, the convict cannot be punished by fine or imprisonment, because no such punishment is provided by law. Jenkins v. State, 13 Ga. App. 695, 79 S. E. 861 (1913); nor can he be indicted and convicted under another Code section (which provides a punishment) for the same conduct. Jenkins v. State, 14 Ga. App. 276, 80 S. E. 688 (1914).

26-602. Misfortune or Accident Not a Crime.—This section revises and brings forward former Ga. Code Ann., § 26-404, "Misfortune or accident as affecting liability," to follow the definition of crime. Section 26-601 now states what is a crime and § 26-602 states what is not a crime. Furthermore, as both §§ 26-601 and 26-602 refer to "intention," former Ga. Code Ann., § 26-202, "Intention, how manifested," logically follows, revised as §§ 26-603, 26-604, and 26-605. The caption of the section was changed simply to be more specific.

Former Ga. Code Ann., § 26-404 stated that a person "shall not be found guilty of any crime or misdemeanor committed by misfortune or accident. . . ." Since the purpose of this section was to excuse from criminal liability one who, without "evil design," criminal intention or negligence, acts or omits to act, the language was changed to state simply that such conduct is not a crime. The elimination of the implied distinction between "crime" and "misdemeanor" was explained in the comment on § 26-601, ante.

The phrase "evil design," as used in former Ga. Code Ann., § 26-404, apparently has not been defined in the statutes or cases, but probably refers to that state of mind which makes one criminally responsible for even those consequences of his undertaking which were not specifically intended. For example: death resulting from the firing of a gun used in the perpetration of a robbery is criminal homicide even if the robber did not intend to pull the trigger and was not negligent in doing so (Lynch v. State, 207 Ga. 325, 61 S. E. 2d 495 (1950); Solesbee v. State, 204 Ga. 16, 48 S. E. 2d 834 (1948)); death resulting from a wound inflicted in making an unlawful arrest is involuntary manslaughter (Griffin v. State, 183 Ga. 775, 190 S. E. 2d (1937)). Section 26-602 employs the words, "criminal scheme or undertaking" to express the same idea more clearly.

The requirement of former Ga. Code Ann., § 26-404 that a party to be excused on the ground of misfortune must have had no "intention, or culpable neglect" is preserved in § 26-602. "Criminal negligence" was substituted for "culpable neglect" so as to be consistent with the language used in § 26-601.

26-603. Acts Presumed to be Wilful.—This is a new section, although based upon former Ga. Code Ann., § 26-202, "Intention, how manifested," and the case law which developed thereunder. The section provides a guide for the jury in finding the existence or absence of that concurrence of act (or omission to act) and intention which is referred to in §§ 26-601 and 26-602. The section states a well-established principle, i.e., that a person is presumed to intend to do that which he in fact does. The presumption may be rebutted by evidence that the act was due to reflex or some other influence, such as hypnosis, which produced the action while inhibiting the actor's will. The presumption applies, as in former Ga. Code Ann., § 26-202, only to the acts of a person of "sound mind and discretion." This means, of course, a person legally sane and within the age of criminal responsibility, as defined elsewhere in the Code. See Chapter 26-7.

the intention to act and the intention to cause criminal consequences. This distinction is discussed further in the comment on the following sections.

26-604. Consequences Presumed Intended.—This section also is based upon former Ga. Code Ann., § 26-202 and the case law which developed thereunder. It also is a rule for the guidance of the jury in finding the presence or absence of that "intention" referred to in § 26-601. The presumption is raised only as to persons of "sound mind and discretion," as explained in the comment on § 26-603. The rule is of ancient origin and established usage in Georgia. Loach v. City of Lafayette, 19 Ga. App. 639, 645, 91 S. E. 1057 (1917). This section, with § 26-603, should make it clear, as former Ga. Code Ann., § 26-202 did not, that only the natural and probable consequences of wilful acts are presumed to have been intended, and that even this presumption may be rebutted. Neither unforeseen consequences, nor possible consequences which did not in fact occur, are presumed to have been intended. Thus one who operated an automobile in a negligent manner, but not under circumstances of obvious danger to others, would not be presumed to intend to kill or injure another. The contrary was possible under existing law. Dennard v. State, 14 Ga. App. 485, 81 S. E. 378 (1914); Easly v. State, 49 Ga. App. 275, 175 S. E. 23 (1934).

This section, with § 26-603, reveals, as former Ga. Code Ann., § 26-202 did not, the dual nature of the mental element of crime. That is, (a) that one's physical movements (acts) may or may not have been wilful and (b) the consequences of those movements (acts) may or may not have been intended to occur. But the presumption in each instance is as stated in these sections.

26-605. Intention a Question of Fact.—This section completes the clarification of the nature of the mental element of crime. Some wilful acts are criminal in themselves (e.g., "Any person who shall stab another . . . shall be punished. . . ." former Ga. Code Ann., § 26-1701), the law presuming the intention to act from the act itself. See § 26-603 and comment, ante.

Other crimes consist of both an act and a consequence (e.g., murder is a wilful act which causes death), the law presuming the intention to cause the consequence if it is a natural and probable result of a wilful (or criminally negligent) act. See § 26-604 and comment, ante.

Another class of crimes are those in which more than an act or an act plus its consequences is required. For example, the acts of taking and carrying away the personal property of another may be wilful acts which naturally and proximately result in depriving the owner of his property, but without the additional element of "criminal intent" or "mens rea"—in this case "animus furandi," the intent to steal—there is no crime. Former Code § 26-2602; Musgrove v. State, 5 Ga. App. 467, 63 S.E. 530 (1908). Section 26-605 makes it clear that such an intention will not be presumed to have existed, but may be found as a fact only after a consideration of all the circumstances surrounding the act for which the accused is prosecuted.

The Criminal Code section makes no change in former law, merely codifying the only method by which criminal intention may be established. See Jackson v. State, 116 Ga. 578, 42 S. E. 750 (1902); Mundy v. State, 59 Ga. App. 509, 1 S. E. 2d 598 (1939). It emphasizes, as former Ga. Code Ann., § 26-202 did not, that the process of ascertaining mens rea or criminal intention cannot be reduced to a simple formula or presumption, but must entail a careful evaluation of all relevant circumstances. See Heughan v. State, 82 Ga. App. 640, 61 S. E. 2d 685 (1950).

CHAPTER 26-7. RESPONSIBILITY

APPENDIX C

Opinion of the Georgia Supreme Court

Kermit Elmer Holton V. The State

243 Georgia 312 (1979)

WE REGRET THAT THE LAST FEW LINES OF EACH OF THE FOLLOWING PAGES WERE NOT OF BETTER PHOTOGRAPHIC QUALITY.

Appendix C

Now 243 Ga 312

In the Supreme Court of Georgia

Decided: MAR 06 1979

34272. KERMIT ELMER HOLTON v. THE STATE.

HILL, Justice.

This is a death case.

Kermit Elmer Holton was indicted in DeKalb County in May, 1977, for armed robbery, burglary, and the murders of Clayton D. Pickrel and Helen S. Pickrel. The jury was instructed to find him not guilty of armed robbery. The jury found him guilty of burglary and the two counts of murder and imposed death penalties for both of the murders. As to the burglary, the trial court entered a judgment of not guilty notwithstanding the verdict on the ground that the State had not proved an entry without authority. The case is before this court on direct appeal and for review of the death penalties.

The evidence showed that the DeKalb County police answered a call from a neighbor of the Pickrels on March 4, 1976. The neighbor had been able to see Mr. Pickrel's body through a curtained den door after dark because a light was on in the den. The police forced their way into the home, where they found Mr. Pickrel lyi[illegible] face [illegible] in the den with a small cargo [illegible]

covering his head. There was evidence from which the jury was authorized to find that Mr. Pickrel died of a gunshot wound fired from a hand held .22 caliber weapon from a distance of 10 to 22 inches. Additionally, his left ear had been lacerated and he had sustained a severe abrasion to his left shoulder. These wounds apparently were caused by blows from a tomahawk, which was found with a broken handle in the den. The tomahawk could have been broken by the blow to Mr. Pickrel's shoulder since considerable force had been applied. Additionally, a spear had been thrust through the sofa in the den. The spear too was broken.

Mrs. Pickrel's body was found lying face down in the hall. She had died of gunshot wounds to her head and chest, inflicted by a .22 caliber weapon. Her head was also covered with a piece of carpet. Mrs. Pickrel had been stabbed twice in the back, apparently after she had died, with a kitchen steak knife which was found broken into two pieces at her shoulder. Her ear had been almost severed, probably by either the tomahawk or the knife. A doctor from the State Medical Examiners Office testified that in his opinion the wounds suffered by the Pickrels had probably been inflicted by a right-handed person.

Because the thermostat in the house was set at 88 degrees, the elevated temperature had caused rapid deterioration of the

bodies, making it difficult to determine the times of death. It was estimated, however, that they died about 20 hours earlier, sometime during the evening of March 3. The Pickrels had last been seen alive on the evening of March 2, when they entertained friends for dinner. Mrs. Pickrel had told their guests that evening that a former employee was in town and had nearly joined them for dinner.

The Pickrels' home had been ransacked and searched. Several items, including a camera, a television set, 2 diamond rings, a sander, and several items of silver, were missing. No unidentified fingerprints were found. Cigarette stubs of the same brand as that smoked by the defendant were found.

In May, 1977, Melinda Harris contacted the Lake County Sheriff's Office in Tavares, Florida, with information about the murders. DeKalb County police officers travelled to Florida where they interviewed Melinda Harris and taped her statement. She later testified at trial that on March 4, 1976, the defendant came to Florida to see her, bringing in his car a Sony television, a silver service, a sander and a mink stole with the initials "HSP". All of those items were identified by the Pickrels' children as having belonged to their parents. She also testified that the defendant told her that he had killed an

elderly man and woman--the man by hitting him in the head with a tomahawk and spearing him in the chest, the woman by shooting her in the head. He also told her that he had turned the thermostat "all the way up." Certain of this information had not been released to the press, e.g., the use of the tomahawk and the identity of the stolen items. In her statement Melinda Harris had said that many of the stolen items had been pawned in Las Vegas but that the defendant's sister had the silver service.

Following the interview with Melinda Harris, an investigator with the homicide section of the DeKalb County Police Department arrested the defendant in Savannah on May 21, 1977. Pursuant to a search warrant, he entered defendant's motel room where he found a number of bullets of the same caliber and manufacture as bullets found at the Pickrel murder scene and a checkbook of defendant's in which were written the Pickrels' name and telephone number. As Ms. Harris had said, the defendant's sister had the silver service.

The defendant testified at the trial; he admitted that he had formerly worked for the Pickrels, denied killing them, denied leaving the stolen articles with Melinda Harris, claimed Melinda told him she bought the stolen items at a flea market, and that he had been in Florida at a family barbeque at the time of the

murders. He also stated that he was left-handed. Members of his family corroborated parts of his testimony.

The verdicts of guilty were substantiated by the evidence. Although not required to be, Ms. Harris's testimony was sufficiently corroborated. Moore v. State, 240 Ga. 210 (1) (240 SE2d 68) (1977).

1. Defendant's first enumeration of error is that the trial court erred in finding that Melinda Harris was not his common law wife, and in overruling his motion in limine by which he sought to prevent her from testifying. Melinda Harris filed a pre-trial motion claiming to be the defendant's wife and declaring her intention not to testify at the trial. The defendant then moved to exclude her testimony, asserting his privilege as to confidential communications. After an evidentiary hearing, the trial court denied the motions. Whether Melinda Harris was the defendant's wife and thus entitled to claim the marital privilege of Code Ann. § 38-1604 was a fact question to be determined by the court. Where, as in this case, the extrinsic evidence contradicted the testimony of the two principal witnesses, the trial court was authorized to find that no common law marriage existed. Cyrenius v. State, 239 Ga. 497 (1) (238 SE2d 50) (1977); Johnson v. State

232 Ga. 61 (5) (205 SE2d 190) (1974). For example, each of them from time to time had signed papers and made statements showing each to be single and much of their time together had been spent in states which do not recognize common law marriage.

2. Defendant's second enumeration of error is that the trial court erred in not granting his motion to compel disclosure and notice to produce with regard to the pre-trial statements of Melinda Harris. Pursuant to defendant's motions, the trial court conducted an in camera inspection of the State's file and ordered that certain material be provided to defendant. He declined, however, to order production of Melinda Harris's statement. We have reviewed the statement, which is in the record. (The statement became available to the defendant when Melinda Harris was examined by use of its contents.) Defendant argues that the statement was material and exculpatory because it provided a basis to challenge the credibility of the State's main witness, Melinda Harris. In her statement she related that she had informed a Las Vegas investigator, whose name she did not recall, of the murders. Defendant argues that this revelation is inherently suspicious because it presents [illegible] failed to follow up on this [illegible]. He further asserts that

could have successfully attacked Melinda Harris's credibility by locating the investigator and establishing the falsity of the report. We find this somewhat attenuated argument is not sufficient to establish that the statement at issue was material or exculpatory under the Brady doctrine, Brady v. Maryland, 373 U. S. 83, 87 (83 SC 1194, 10 LE2d 215) (1963). Furthermore, production was not required by Rini v. State, 235 Ga. 60 (1) (218 SE2d 811) (1975). Although Melinda Harris was a key witness for the State and her credibility was an important factor, her testimony was corroborated by a wealth of physical evidence and the alleged misrepresentation in her statement does not tend to show that the defendant was not guilty or should be given lesser punishment. Nor was defendant entitled to the statement under Brown v. State, 238 Ga. 98 (231 SE2d 65) (1976). This court has held that "[S]tatements of witnesses in the prosecutor's files (nothing more appearing) may not be reached by Code Ann. § 38-801(g)." Stevens v. State, 242 Ga. 34 (1) (SE2d) (1978).

3. Defendant's third and fourth enumerations of error concern his second motion to suppress. Defendant's initial motion to suppress was filed on October 5, 1977, and related to items seized from his sister's home, namely the stolen stereo [illegible]

That first motion to suppress was considered and overruled during the three days set aside to entertain over a dozen pre-trial motions, October 17-19, 1977. Subsequently, on Thursday afternoon, November 3, 1977, defendant filed a second motion to suppress items seized from his motel room on or about May 20, 1977. The trial began, as scheduled, on Monday, November 7, 1977. On November 8th following argument by counsel on the merits of this motion, the trial court denied the motion, finding that it was "not timely filed and dilatory in nature." The motion sought suppression of the evidence obtained on May 20, 1977, from defendant's motel room and from his person on the ground, among others, that the affidavit supporting the search warrant was defective. Although the prosecuting attorney stated that the defendant was necessarily aware of the warrant because a copy was left with him on that date, defendant's attorney stated that that was not the case as his client was already under arrest. This was later corroborated by the police officer who conducted the search of the motel room when he testified at trial that the defendant was not present at the time because he was already under arrest.

The record shows, however, that at the time of the hearing on [illegible] at [illegible]

[illegible] of certain of his property seized. At the October 17 hearing, the prosecuting attorney pointed out that the defendant's attorney had viewed all of the State's evidence that was being held in the DeKalb County Police Department's property room but had not viewed the evidence at the State Crime Lab, which included "bullets, a checkbook with some names written in the checkbook, some blood samples, and possibly some towels from the scene." Thus the defendant was on notice at least no later than October 17, 1977, both that his motel room had been searched and evidence seized, and that the evidence which he now complains of (the checkbook and bullets) was in the State's possession. The only thing defendant's counsel allegedly was not aware of was the fact that the room was searched pursuant to a warrant. No motion to suppress as to the motel search based upon a warrantless search, or defective warrant search, was made prior to November 3, 1977. In sum, we cannot find that the trial judge abused his discretion in ruling the second motion to suppress, brought nearly on the eve of trial, dilatory. Thomas v. State, 118 Ga. App. 359 (2) (163 SE2d 850) (1968), cert. denied, 394 U. S. 943 (1969).

4. Defendant's remaining enumerations of error are addressed to the imposition of the death penalty.

According to law, Code Ann. § 27-2534.1(c), the jury was instructed that if its verdict be death, it must designate in writing (signed by the foreman) the aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury was instructed that it should consider as aggravating circumstance whether the murders were outrageously or wantonly vile, horrible or inhuman in that they involved depravity of mind or aggravated battery to the victims.[1/]

The jury fixed the punishment on both counts of murder as death "by reason of depravity of mind." This is only a part of a statutory aggravating circumstance. It omits all reference to the words "outrageously or wantonly vile, horrible or inhuman." See Code Ann. § 27-2534.1(b)(7). See also Ruffin v. State, #33865 decided January 24, 1979; Godfrey v. State, #34256 decided 2-27-79.

/1/ The assistant district attorney conceded that the word "torture" should be omitted as there was no evidence of torture before the deaths occurred. The court also instructed the jury as to the definition of aggravated battery. [illegible] instructed them that they could not find an aggravating [illegible] to Mrs. Pickrel. [The State did not rely on [illegible] to obtain the death penalty. [illegible] 2-27-79.... P. 21.]

It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive a constitutional challenge based on Furman v. Georgia, 408 U. S. 238 (92 SC 2726, 33 LE2d 346) (1972); i.e., such an aggravating circumstance could be so broad as to allow the death penalty to be imposed at random in any murder case. See Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976). Here, however, although the jury was polled, the defendant did not object to the form of the verdict at the time of its return. Because there is to be a resentencing trial (see below), this problem should not arise again.

5. In the order denying defendant's motion for new trial, citing Spivey v. State, 241 Ga. 477 (2) (246 SE2d 289) (1978), the trial court recognized "that the pre-sentence charge did not comply with the decisions of the Supreme Court. . . ." Because of the lengthy pre-trial and trial proceedings, however, the trial court declined to order a new trial on sentencing, pending a review by this court of the guilt-innocence proceedings. Likewise, the district attorney [illegible]

failing to adequately charge on mitigating circumstances and in failing to make clear to the jury that they could recommend a life sentence even though they found a statutory aggravating circumstance. Spivey v. State, supra; Lamb v. State, supra; Bowen v. State, 241 Ga. 492 (3) (246 SE2d 322) (1978); Burger v. State, 242 Ga. 28 (10) (SE2d) (1978); Stevens v. State, 242 Ga. 34 (7) (SE2d) (1978); Harris v. Hopper, #34567 decided February 27, 1979.

The convictions of the defendant for murder are affirmed. The sentences of death for murder are set aside, and a new trial is allowed on the issue of punishment for those offenses.

Judgment affirmed in part and reversed in part. All the Justices concur, except Hall J. who concurs in Divisions 1, 2, 3, 5 and the judgment.